No. 13345

In the United States Court of Appeals for the Ninth Circuit

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PORTLAND GENERAL ELECTRIC COMPANY, INTERVENOR

PETITION OF THE UNITED STATES OF AMERICA AND THE FEDERAL POWER COMMISSION FOR A REHEARING

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PETITION OF THE UNITED STATES OF AMERICA AND THE FEDERAL POWER COMMISSION* FOR A REHEARING

To the Honorable Judge STEPHENS, Judge HEALY and Judge ORR, Judges of the United States Court of Appeals for the Ninth Circuit:

Come now J. Lee Rankin, Assistant Attorney General, Willard W. Gatchell, General Counsel for the Federal Power Commission, and William H. Veeder, Special Assistant to the Attorney General, for and on behalf of the United States of America and the Federal Power Commission, pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, and petition this Honorable Court for a Rehearing, predicating that petition upon the grounds and for the reasons hereinafter set forth, and

*Wherever the United States of America is used, that reference includes the United States of America and the Federal Power Commission.

Respectfully suggest to this Honorable Court, to its Chief Judge and all members of this Court that:

[1] The opinion, dated February 18, 1954, of this Honorable Court in the above-entitled case is of great and far-reaching importance to the welfare of the Nation and in particular to those states which constitute the Ninth Judicial Circuit of the United States;

[2] The subject opinion is contrary to and at variance with—

(a) The decisions and laws of the State of Oregon;

(b) The decisions of this Honorable Court;

(c) The decisions of the Supreme Court of the United States of America;

(d) The express will of Congress;

[3] The subject decision being at variance with and contrary to a long and uninterrupted line of earlier decisions by this Honorable Court has injected grave uncertainty respecting cases now on appeal or otherwise before this Honorable Court; now pending or in the process of being tried in the states constituting the Ninth Judicial Circuit; now pending before the Supreme Court of the United States of America;

Now, therefore, your petitioners most respectfully suggest to this Honorable Court that there be granted to your petitioners a rehearing en banc.

J. Lee Rankin,
Assistant Attorney General.

Willard W. Gatchell,
General Counsel,
Federal Power Commission.

William H. Veeder,
Special Assistant to the Attorney General.

Dated _____

DISTRICT OF COLUMBIA, *ss:*

The undersigned, acting for the United States of America and the Federal Power Commission, being duly sworn, depose and say: That they are J. Lee Rankin, Assistant Attorney General; Willard W. Gatchell, General Counsel for the Federal Power Commission; and William H. Veeder, Special Assistant to the Attorney General, and that they are immediately responsible for the conduct of the proceeding referred to in the accompanying Petition and Suggestion for Rehearing; they have read the above and foregoing Petition and Suggestion and know the contents of them; that the Petition and Suggestion are true to their knowledge.

J. LEE RANKIN,
Assistant Attorney General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

WILLIAM H. VEEDER,
Special Assistant to the Attorney General.

Subscribed and sworn to before me this ——— day of ————, 1954.

Notary Public.

My commission expires:

STATEMENT

Analysis of subject opinion

This Honorable Court rendered its decision in the subject case on February 18, 1954. It there declared that a license issued by the Federal Power Commission to the Portland General Electric Company for

the Pelton Project, a hydroelectric project on the Deschutes River "trenched upon the sovereignty of the State of Oregon." That decision was based upon this Honorable Court's conclusion that the ownership of the site of the power dam "does not empower the United States government to use the waters of the Deschutes River either at the site of the power dam or elsewhere, contrary to Oregon state law. * * * Oregon has the right to regulate its own waters in its own chosen way."[1]

By its opinion this Court recognizes the power of the "Commission * * * to give its *approval* to the [Pelton] Project as a whole." It does not doubt that the Commission "has the right to grant its *permissive license* to the *construction* of the proposed dam upon its [the United States of America's] own property." Objection is, however, directed to the license issued by the Commission as it purports "to grant the complete legal right to the construction and operation of the whole Project," for the reason that the license thus granted was "contrary to Oregon state law."

There are reviewed in the subject opinion the objections registered by the State of Oregon, the Fish Commission of Oregon, and the State Game Commission. These are the charges against the applicant for license, the Portland General Electric Company:[2]

> 1. [It] failed to obtain a permit from the Hydro-Electric Commission of Oregon.

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[1] These quoted excerpts are taken from the two final paragraphs of the majority opinion.

[2] Opinion, page 3.

> 2. [It] had not complied with the Oregon law as to fish in the river.

It is likewise asserted by the State and its agencies that the Pelton Project[3] "would prevent the ascent of anadromous fish to their spawning grounds above the dam sites, and would result in the serious curtailment of the fish population and prevent its increase, and would impair the productivity and usefulness of the extensive State Fish Hatchery on the Metolius River."

Having reviewed the powers of the Commission in the light of the objections, this Honorable Court declared:

> Our conclusion as to the meaning and effect of Sec. 9 (b) [of the Federal Power Commission Act] does not, however, destroy the objectors' case, for they rely upon the more fundamental claim that the Deschutes River is a state stream and that the State of Oregon has sovereign power over it and its waters.[4]

Thereafter the Court proceeded "to the question of the sovereign power over the waters of the Deschutes River," adding "We think the regulation of the river as it flows through the state is one of the powers of the state's sovereignty and includes regulatory powers as to fish in state waters."[5]

Respecting the sovereign power over the stream last mentioned reference is made to the Congressional Acts of 1866, 1870, and the Desert Land Act of 1877

[3] Opinion, page 2, last paragraph.
[4] Opinion, page 6, 2d full paragraph.
[5] Opinion, page 8; page 10.

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which separated the title "of western lands in the public domain" "from the right to the control of the water and allowed the states, within which such waters flowed, to regulate them." The opinion then alludes to the Water Code of the State of Oregon enacted in the year 1909, which declared at that date that "All water within the State from all sources belong [*sic*] to the public." Based on a review of the last-cited Congressional and State acts, this Honorable Court concluded:

> Whatever, if any, limitation there was on Oregon's complete sovereignty over the waters of the Deschutes River, was wiped out by the Desert Land Act of 1877.[6]

Crux of this Honorable Court's opinion is, therefore, that the United States of America has relinquished to the State of Oregon full control over the Deschutes River; that the State of Oregon has assumed full control over that stream; that as a consequence the United States of America is precluded from taking any action respecting the use of the waters of that stream upon lands title to which resides in the United States of America which is "contrary to Oregon state law."

Circuit Judge Healy's dissenting opinion

Judge Healy of this Honorable Court has reviewed in his dissenting opinion certain fundamental principles which, it is respectfully submitted, are predicated upon a virtually unbroken line of decisions of this Honorable Court which are precedents for his

[6] Opinion, page 8; page 9, first paragraph; page 10.

conclusions. Your Petitioner respectfully reiterates those principles, tendering, however, to this Honorable Court principles and precedents that fully warrant its granting the rehearing so important to the Western development and to the Nation's welfare.

The relationship between the United States of America and the State of Oregon respecting the waters of the Deschutes River—the restrictions on Oregon's powers respecting the subject matter of the case

There passed to the United States of America by its treaty of 1846 with Great Britain the lands now constituting the State of Oregon.[7] Traversing a portion of that great area of public domain was the Deschutes River. That the stream and the lands through which it flowed were subject to the control of Congress by reason of the Constitution of the United States of America is not susceptible of question.[8] Pursuant to that and related investitures of Constitutional power, the Congress enacted legislation creating the Territory of Oregon.[9] That Act constituted the temporary government, defined its boundaries and "provided, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights remain un-

[7] Treaty between the United States and Great Britain, concluded June 15, 1846; Proclaimed August 5, 1846. See *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142 (1934).

[8] Constitution of the United States, Article IV, Sec. 3, Cl. 2: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States * * *."

[9] Act of Congress, August 14, 1848; 9 Stat. L. Ch. 177, Sec. 1, p. 323.

extinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed; * * *."

Respecting the properties of the United States of America the last cited act provided that, "no law shall be passed interfering with the primary disposal of the soil."[10] On June 25, 1855, a Treaty was entered into between the United States of America and the Confederated tribes of Indians in Middle Oregon.[11] There was thus ceded by the Indians to the United States of America an immense area of inestimable value. Reserved by the Indians in their Treaty was an area: "Commencing in the middle of the channel of the De Chutes River". That reserved area was thence delineated with a description which concludes: "thence down the main branch of De Chutes River; heading in this peak to its junction with De Chutes River; and thence down the middle of the channel of said river to the place of beginning."[12]

Parenthetically, in regard to the Treaty, this statement must be accorded great weight:

> When considering the nature of the grant under consideration, we must not forget that it was not a grant to the Indians, but was one

[10] Section 6.
[11] 12 Stat. 963.
[12] 12 Stat. 964.

> from them to the United States, and all rights not specifically granted were reserved to them.[13]

Consonant with the principle that it was a cession by the Indians to the United States of America, not the reverse, is this express provision of the Treaty that—

> the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians.[14]

On June 3rd, 1859, the people of the State of Oregon adopted the proposition propounded by Congress in these terms: "Be it ordained by the legislative assembly of the state of Oregon, That the said state shall never interfere with the primary disposal of the soil within the same by the United States, * * *." Important likewise is the provision of the Constitution of the State of Oregon that "All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." [15]

Clear from the brief résumé is the fact that the territorial laws limited the power of the State of Oregon respecting Indian lands; that the Indians *"reserved"* the property now constituting the Warm Springs Indian Reservation to the middle of the Deschutes River and "secured" to themselves the exclusive right to fish in that stream in those reaches of it that border upon or traverse the reservation.

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[13] *United States* v. *Hibner et al.*, 27 Fed. 2d 909, 911 (D. C. E. D. Idaho 1928).

[14] 12 Stat. 964.

[15] Opinion, page 3, footnote 4. Oregon Constitution of 1859, Sec. 7, Article XVIII.

> Too great stress may not be placed upon these facts: The Warm Springs Indian Reservation was never a part of the public domain; was specifically reserved by the Treaty of 1855 for the Indians; accorded to them by that Treaty was the exclusive right of fishery in the Deschutes River. Moreover, the reservation lands extended to the middle of the stream in question. The State of Oregon by the Territorial laws; the Act granting admission of that State to the Union; by its Constitution, was precluded from legislating in regard to the property of the Indians.

Stress must likewise be placed upon this statement from the subject opinion:

> * * * the principal or upper dam is to be built upon and affects land reservations of the United States, inclusive of the lands of the Warm Springs Indian Reservation. The Indians of the Reservation have given their consent to the construction of the [Pelton] Project.

Withdrawal of public lands for power purposes—the dates of withdrawal—Oregon's enactments—their dates

Reviewed in the phases immediately preceding are the pertinent elements respecting the jurisdiction of the United States of America over the Warm Springs Indian Reservation; the rights of the Indians reserved and preserved for them by the Treaty. From that review is revealed the pertinent fact that the western half of the main project to the thread of the Deschutes River is within the Warm Springs Indian Reservation.

Consideration is next directed to that portion of the Pelton Project which will occupy the stream east

of its thread. As recognized by the subject opinion, those lands are owned by the United States of America. Moreover, the vast majority of the lands to be flooded are owned by the United States of America or are located in the Warm Springs Indian Reservation. No factor of importance here has been ascribed in the opinion to the acreage in private ownership which would be submerged by the reservoir.

All of the lands, both Indian and those on the east bank, were withdrawn for power purposes. That was accomplished by the Order of the Secretary of the Interior dated December 30, 1909, made permanent by the Executive Order of July 2, 1910.[16] Subsequent withdrawals for power purposes including the tribal lands were made November 1, 1910,[17] and October 8, 1913.[18]

In the year 1931 the State of Oregon enacted comprehensive police regulations in regard to power projects.[19] By that Act provision was made that "From and after the taking effect of this act, no water-power project involving the use of the waters * * * for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof."[20] To be noted is the fact that the law in question specifically provides that: "The provisions of this act shall not apply to any water-power project or development constructed by the government of the United

[16] Pursuant to the Act of June 25, 1910 (36 Stat. 847).
[17] Indian Power Site Reserve No. 2 (36 Stat. 855).
[18] Executive Order October 8, 1913 (36 Stat. 847).
[19] Vol. 8, Oregon Compiled Laws Anno., Sec. 119–101 et seq.
[20] Vol. 8, Oregon Compiled Laws Anno., Sec. 119–103.

States.'"[21] In the year 1932 the Constitution of the State of Oregon was amended to provide: "The rights, title and interest in and to all water for the development of water power and to water power sites, which the State of Oregon now owns or may hereafter acquire, shall be held by it in perpetuity."[22] Legislation was likewise enacted by the State of Oregon in the year 1921 which, among other things, provided that:

> It shall be unlawful for any person to construct any dam or artificial obstruction across any stream in this state frequented by salmon or other food fish, or to maintain any such dam or obstruction heretofore erected without providing a passageway for such fish over such obstructions, such passageway for fish to be constructed as near the main channel as may be practicable.[23]

Thus, if the timing is of any significance in the reasoning of the Court, two of the principal police regulations, and the Constitutional amendment relied upon by the State of Oregon in its objections to the license were enacted many years after the United States of America had withdrawn from the public domain for power purposes the power site in question.

Reference is likewise made by the objectors to the Territorial Act adopted by *Congress* which provided that "the rivers and streams of water in said Territory of Oregon in which salmon are found * * *

[21] Vol. 8, Oregon Compiled Laws Anno., Sec. 119–101.

[22] Constitution of Oregon, Article XI–D—State Power Development.

[23] Vol. 5, Oregon Compiled Laws Anno., Sec. 83–314.

shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams." Reliance was likewise placed by the objectors upon the provision of the Water Code of 1909 which provided: "All waters within the state from all sources of water supply belong [*sic*] to the public." That police regulation and the Congressional Acts of 1866, 1870 and 1877 will be the subject of extended review in this consideration. Here, however, it is emphasized that the State of Oregon's legislation "* * * cannot affect titles vested in the United States of America." [24]

There is no invasion; no encroachment and no interference with vested or inchoate rights on the Deschutes River by the Pelton Project

"It should be borne in mind that the licensing or construction of this hydroelectric project will in no way impinge upon vested rights or interfere with the appropriation, diversion, distribution or use of water of the stream for irrigation or other purposes," in the succinct statement of Judge Healy, which emphasizes the care taken in connection with the Pelton Project to protect downstream users. Recognized by Judge Healy is the fact that the Portland General Electric Company seeks to apply the water to a nonconsumptive use through the construction of dams on the main channel of the Deschutes River. Reflected by Judge Healy's statement is this express condition in the Order of the Commission: R. 443

[24] Vol. 8, Oregon Compiled Laws, Anno., Sec. 116–401, *United States* v. *Utah*, 283 U. S. 64, 75 (1930).

> Any rights to the use of waters in the Deschutes River and its tributaries in connection with the licensee's project under this license shall be subordinate to: (i) All existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries * * *.

Full protection is thus accorded rights to the use of water on the stream in question. It is difficult to perceive of greater care being taken to avoid downstream damage—a fact which is underscored by the costly structure built below the main dam to regulate the regimen of the river. Moreover, there are no claims here to the use of the waters of the Deschutes River with which the license would interfere, such as the claims in the *Niagara Mohawk* case decided March 15, 1954, by the Supreme Court.[25]

Thus in the words of Judge Healy: "The sole grievance as respects the installation is that it will halt the ascent of anadromous fish (here, salmon and steelhead trout) to their spawning grounds on the upper reaches of the Deschutes." Yet the Commission found that there is "no substantial evidence to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased."

Separate consideration is not directed to the question of the effect of the Pelton Project upon the fish runs for the reason that this Honorable Court has declared that: "* * * the regulation of the river as

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[25] *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, CADC, 1952, 202 F. 2d 190; affirmed March 15, 1954, Supreme Court of the United States, No. 28, October Term, 1953.

it flows through the state is one of the powers of the state's sovereignty and includes regulatory powers as to fish in state waters.'' [26] As the regulatory authority over both water and fish stems from police power of the State there is no need of differentiation in the consideration.

QUESTIONS PRESENTED

[1] Whether the police regulations of the State of Oregon enacted many years subsequent to the Treaty of 1855 and the withdrawal of power sites from the public domain could limit or in any way affect the powers of the United States of America?

[2] Whether the Congressional Acts of 1866, 1870, and 1877 limited [a] the powers of the United States of America to utilize the unappropriated waters of the Deschutes River upon the lands withdrawn for power purposes; [b] or could affect the rights of the Indians on the Warm Springs Indian Reservation?

[3] Whether, in the light of the fact that the State of Oregon is without power to impair the rights of the Indians, the police regulations which it enacted could in any way affect the lands or rights to the use of waters traversing or bounding the Warm Springs Indian Reservation?

In the succeeding phases of this memorandum of authorities in support of the petition for rehearing these basic principles of the law are reviewed:

(1) The lands reserved in the Treaty of 1855 between the United States of America and the Indians were never part of the public domain

[26] Opinion, page 10.

and were not and are not subject to the Acts of 1866, 1870, and the Desert Land Act of 1877.

(2) The lands reserved for power purposes by the United States of America were severed from the public domain and were not thereafter subject to the Acts of 1866, 1870, and the Desert Land Act of 1877.

(3) Although certain of the lands involved were once part of the public domain the United States of America was empowered to withdraw those lands; to issue a license in accordance with the provisions of the Federal Power Act subject to existing rights.

(4) The police regulations of the State of Oregon have no application to the United States of America and the lands and waters reserved by the United States of America for power purposes are not subject to those police regulations.

ARGUMENT

Lands severed from the public domain—lands reserved for the Indians are not subject to the Acts of 1866, 1870, and the Desert Land Act of 1877

"The United States being the absolute owner and proprietor of all of its public lands and having the full power of disposal, it has also the power to dispose of such lands as the Government by its Congress may from time to time provide."[27] Continuing from the same source, this statement is quoted: "* * * the general Government, [is empowered] as owner of both the land and waters of the public domain, to reserve certain waters for its own use and for the

[27] Kinney on Irrigation and Water Rights, 2nd ed., vol. 1, sec. 413.

use of its wards—the Indians—on Indian, also on military, and other reservations."

That source then, quoting from the opinion of this Honorable Court, concluded:

> As was said in a recent opinion by the United States Circuit Court of Appeals [Ninth]: "* * * the United States may, where circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose, * * *."[28]

With reference to the power of the United States of America to administer its properties; to sever the waters from the land and dispose of them separately; to reserve, when necessary, the unappropriated waters, there is necessarily presented the question as to the breadth of application to be ascribed to the Acts of 1866, 1870 and 1877. Response to that inquiry is likewise to be found in the decisions of this Honorable Court. On the subject it has authoritatively stated:

> The law is well settled that the doctrine of appropriation * * * applies only to public lands and waters of the United States. * * * And it is equally well settled that, when the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and that no subsequent law or sale should be construed to embrace or operate upon them."[29]

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[28] Kinney on Irrigation and Water Rights, 2nd ed., vol. 2, sec. 667.

[29] *Winters* v. *United States*, 143 Fed. 740, 747, 748 (C. A. 9, 1906).

Frequently the courts have had occasion to review the applicability of the laws in question and in every instance have denied that they applied to lands severed from the public domain.[30] Respecting the withdrawal and severance of the public domain, the Supreme Court has declared:

> The United States can prohibit absolutely or fix the terms on which its property may be used. * * * The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes.[31]

When the Congress has thus set aside or authorized that lands be set aside from thence forward, the Acts of 1866, 1870 and 1877 by their express provisions are limited to the public lands. For as stated by this Honorable Court in a case squarely in point on the conclusion last expressed:

> Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U. S. C. A. § 661, requires recognition of those rights. That statute, however, applies only to "public" lands. * * * Lands which are reserved are severed from the public domain. * * * The statute mentioned, therefore, does not, we think, apply here. **Likewise, the Montana statutes regarding water rights**

[30] *United States* v. *Utah Power & Light Co.*, 209 Fed. 554, 560 (C. A. 8, 1913); affirmed 243 U. S. 389, 404 (1916).

[31] *Light* v. *United States*, 220 U. S. 523, 536, 537 (1910).

> **are not applicable, because Congress at no time has made such statutes controlling in the [Indian] reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, "shall remain under the absolute jurisdiction and control of the Congress of the United States."** [32]

The conclusions there expressed by this Court are in full conformity with the rule adhered to by the Highest Court that "* * * lands which have been appropriated or reserved for a lawful purpose are not public * * *." [33]

As emphasized, this Honorable Court and the Supreme Court of the United States have decided that the acts relating to the public domain—the Acts of 1866, 1870, and 1877—have no application to the lands which were never a part of the public domain or by subsequent legislation were removed from it.[34]

This conclusion predicated upon that unvarying line of decisions of this Honorable Court and the Supreme Court, which have been reviewed, is respectfully submitted:

> The United States of America has the full power under the Constitution, having with-

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[32] *United States* v. *McIntire*, 101 F. 2d 650, 654 (C. A. 9, 1939).

[33] *United States* v. *Minnesota*, 270 U. S. 181, 206 (1925).

[34] *Winters* v. *United States*, 207 U. S. 564 (1908); *United States* v. *Powers*, 305 U. S. 527 (1939); *United States* v. *Walker River Irrigation District, et al.*, 104 F. 2d 334 (C. A. 9, 1939); *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (C. A. 9, 1908); *United States* v. *McIntire*, 101 F. 2d 650 (C. A. 9, 1939); *United States* v. *Parkins*, 18 F. 2d 643 (D. C. Wyo. 1926); *Skeem* v. *United States*, 273 Fed. 93 (C. A. 9, 1921). *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690 (1899).

> drawn the lands from the public domain, to grant the licensee, subject to existing rights, the privilege of constructing and maintaining the Pelton Project which is here involved. That conclusion is, of course, equally applicable to the lands and the rights to the use of water reserved in connection with the Warm Springs Indian Reservation which were never part of the public domain.

Police powers of the State of Oregon may not be invoked to defeat the fulfillment by the National Government of its responsibilities [35]

Reference is made in the subject opinion [36] to the objections registered by the State of Oregon. It is asserted by the State that the Portland General Electric Company had failed to obtain a permit from the Hydro-Electric Commission of Oregon. Reliance by Oregon is placed upon its statute which provides that after the effective date of the act

> * * * no water-power project involving the use of the waters * * * within the state of Oregon, * * * for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof.

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[35] To be noted: In its opinion this Honorable Court has directed its conclusions to the United States of America. They do not relate to the licensee, the Portland General Electric Company. On the subject this precise statement is made in the opinion: "Whether the right of a licensee of the government to use government property is as broad as the government's right to use it, is not raised in the case and we have not considered it." Thus the authorities and comments which are here made pertain to the National Government as distinguished from the licensee.

[36] *The State of Oregon, et al.* v. *Federal Power Commission, et al.*, decision of February 18, 1954, pages 2 and 3, footnotes 3 and 4.

That last cited act became law in the year 1931. Reliance is likewise placed upon a statute which provides that "It shall be unlawful for any person to construct any dam or artificial obstruction across any stream in this state frequented by salmon * * * without providing a passageway for such fish over such obstructions, * * *." The latter enactment became law in the year 1921.[37]

An analysis of the character of the act first set forth will facilitate a disposition of the issues which are here presented. Fortunately this Honorable Court has had occasion to comment upon the laws of the State of Oregon respecting the use of water.[38] This Court declared that they were adopted pursuant to the police power of the State as part of a comprehensive system for the acquisition and adjudication of rights to the use of water. That conclusion comports with Wiel's authoritative statement that regulation of rights to the use of water stems from "the police power of the State."[39] It has likewise been declared that "* * * the public authority, under the police power, may enact and enforce reasonable regulations in respect of the exercise of the right of appropriation."[40]

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[37] Vol. 8, Oregon Compiled Laws Annotated, Sec. 119–103; Vol. 5, Oregon Compiled Laws Annotated, Sec. 83–314.

[38] *California-Oregon Power Company* v. *Beaver Portland Cement Co.*, 73 F. 2d 555 (C. A. 9, 1934); affirmed 295 U. S. 142 (1934).

[39] Wiel, Water Rights in the Western States, 3d ed., vol. 2, sec. 1184, page 1097.

[40] 56 Am. Jur., Waters, Sec. 295, page 745; 56 A. L. R. 283.

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Important is this fact that our Highest Court, regarding a similar statute in the State of Arizona, has declared it to be a State police regulation.[41] Seldom will there be found a decision having such precise bearing on a problem. From that case this extremely relevant statement is taken:

> The wrongs against which redress is sought are, first, the threatened invasion of the quasi-sovereignty of Arizona by Wilbur [Secretary of the Interior] in building the dam and reservoir without first securing the approval of the State Engineer as prescribed by its laws; * * *.

Continuing, the Court declared:

> *First.* The claim that quasi-sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the State. * * * [Arizona's] statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State Engineer; * * *.

Non-compliance with Arizona's laws was thus recognized by the Court:

> The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

Thus the Supreme Court had before it an exact counterpart of the problem here presented: Is a Federal official or agency bound to comply with State

[41] *Arizona* v. *California*, 283 U. S. 423, 451 (1930).

regulations governing the construction of dams? An emphatic negative to this inquiry is contained in the Court's reply:

> The United States may perform its functions without conforming to the police regulations of a State. * * * If Congress has power to authorize the construction of the dam and reservoir, Wilbur [Secretary of the Interior] is under no obligation to submit the plans and specifications to the State Engineer for approval.

Like the police regulation respecting the height of structures, the authority to control fish resides in the State by reason of its police power. On the subject this statement has been made:

> It is well established that * * * control over the waters within its boundaries, and over the fish and game, * * * is within the police power of a State * * *.[42]

Our Nation's freedom to act within the sphere of its authority without restraint by State police regulations pertains to all of its powers and not just those stemming from the Commerce Clause which was the source of its power in the last cited case. There has been unswerving adherence to the principle now being reviewed. When, in violation of State game laws, an official of the Forest Service, acting under the direction of the Secretary of Agriculture, killed deer which were destroying a National Forest, the Highest Court declared:

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[42] Kinney on Irrigation and Water Rights, 2nd ed., vol. 1, sec. 369, p. 625.

> The direction [to kill the deer] given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. *And the power of the United States to thus protect its lands and property does not admit of doubt, * * * the game laws or any other statute of the state to the contrary notwithstanding.* [Emphasis supplied.]

As this Court specifically declared:

> The federal Constitution delegates to Congress, absolutely and without limitations, the general power * * * concerning the public domain, * * *.
>
> The exercise of that power cannot be restricted or embarrassed in any degree by state legislation.[43]

Further references to authorities would be of no assistance to this Court. Suffice to state that from the formative years of our country there has been general adherence to Justice Marshall's statement that: "To impose on it the [United States of America] the necessity of resorting to means which it cannot control, which another government [the State] may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." [44]

Accepting the rationale of Justice Marshall's last quoted statement, it is difficult to perceive of a more

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[43] *Hunt* v. *United States*, 278 U. S. 96, 100 (1928); *Shannon* v. *United States*, 160 Fed. 870, 874 (C. A. 9, 1908).

[44] *McCulloch* v. *Maryland*, 17 U. S. 315, 422 (1819).

striking instance of subverting the will of Congress within its sphere of constitutional authority to the control of the State. Here, it is respectfully submitted, is a prime instance of the property of the United States of America being "completely at the mercy of state legislation." [45]

Premised on the cited decisions this Honorable Court is respectfully requested to reconsider the opinion to which this petition and brief pertain.

Oregon's declaration in the year 1909 that "all water within the State from all sources of water supply belong [*sic*] to the public" [46] is an exercise of the sovereign power to regulate—not a claim to title as a proprietor or owner of the water

In that phase of this consideration which immediately precedes it was emphasized that the statute of the State of Oregon respecting the acquisition and administration of rights to the use of water was adopted in the exercise of its police power. That is, of course, the source of regulatory power which the States have historically exercised. When the State of Oregon, in the year 1909, enacted its comprehensive code respecting rights to the use of water, it did not by legislative fiat invest itself with title to all of the rights to the use of water within the State, including those appurtenant to the Warm Springs Indian Reservation.

In a relatively recent case the Supreme Court of the State of Utah, respecting its prototype of that here involved, held: "The statutory declaration that

[45] *Camfield* v. *United States*, 167 U. S. 518, 526 (1896).

[46] Vol. 8, Oregon Compiled Laws Annotated, Sec. 116–401.

'The water of all streams and other sources in this State * * * is hereby declared to be the property of the public' does not vest in the state title or ownership of the water as a proprietor." [47] Thus, continued that court, the declaration may relate only to that water "that is subject to appropriation and use, being subject at all times to the existing rights to the use thereof." [48]

As declared: "The effect of the dedication of the waters of a State to the State or to the people confers no ownership of title in the running waters flowing within such respective jurisdictions. * * * The public ownership if any distinction is made, is rather that of sovereign than that of a proprietor. Therefore, such a declaration confers upon the State the powers of administration or regulation of the waters flowing within its boundaries, and also the power of regulating the appropriation and use of such waters as between the respective individual claimants thereto. In other words, the State acts under these terms of dedication in its sovereign capacity only, and not as proprietor or owner of the water." [49]

Similarly, the Supreme Court of the State of Idaho has decided:

> We think it is clear that the title to the public waters of the state is vested in the state * * *. This is not, however, an interest or title in the

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[47] *Wrathall* v. *Johnson*, 86 Utah 50, 40 P. 2d 755, 777 (1935).

[48] *Ibid.*, 86 Utah 50, 40 P. 2d 755, 779 (1935).

[49] Kinney on Irrigation and Water Rights, 2d Ed., Vol. 1, Sec. 387.

> proprietary sense, but rather in the sovereign capacity as representative of all the people * * *.

Reason for that conclusion is expressed by the court:

> It will be found that the authorities quite uniformly class wild animals, fish, water, gas, light and air as things of the "negative community" or the property of no one, and that they are consequently res communes and subject to the regulation and control of the state in its sovereign capacity.[50]

As stated by the Highest Court respecting migratory birds which are placed by the authorities in the same category as running water:

> The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, * * * To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.[51]

Judge Pope of this Honorable Court, with great clarity, has summarized, in a dissenting opinion, the principles which have been reviewed above.[52] His succinct statements embraced the principles here involved when he declared with reference to statutes providing that all waters are the property of the public: "* * *

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[50] *Walbridge* v. *Robinson*, 22 Idaho 236, 125 Pac. 812, 814 (1912).

[51] *Missouri* v. *Holland*, 252 U. S. 416, 434 (1919).

[52] *People of the State of California* v. *United States*, 180 F. 2d 596, 608 (C. A. 9, 1950).

such enactments have always been held to be mere general declarations that the waters within the state shall be available for acquisition by the people in accordance with local laws. Such a statutory declaration has no more force or effect as basis for the establishment of property rights than the somewhat similar statutory declaration that wild animals and birds are the property of the people of the state."

This Court in its review of the Water Code of Oregon as emphasized earlier, voiced general acceptance of the concept that the State laws in question are police regulations.[53] It is respectfully submitted in concluding the present phase of this consideration, that: Oregon's statute enacted in 1909—a half century subsequent to its admission into the Union—declaring "all waters within the state from all sources of water supply belong to the public"—

> [1] was an exercise of the State's police power;
>
> [2] was not a claim of title as a proprietor, but rather the act of a sovereign for purposes of regulation;
>
> [3] was not confiscatory of the vested rights of the individual or of the National Government.

Oregon's declaration in 1909 that "all waters within the State from all sources of water supply belong [sic] to the public" did not take vested rights without due process

When Oregon adopted its comprehensive Water Code it did so in a manner which did not impair

[53] *California-Oregon Power Company* v. *Beaver Portland Cement Co.*, 73 F. 2d 555 (C. A. 9, 1934).

vested rights. That principle is explicit from the statute; it is manifest from the opinions of that State's highest court. By statute Oregon's declaration in 1909 that all waters within the State belong to the public was subject to this limitation: "* * * nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water * * *."[54]

With reference to springs, Oregon's supreme court, reiterating with emphasis the language of the last quoted statute, ruled: "The statute of this state, providing for appropriation for beneficial use of the waters of the state, provides for such appropriation of public waters and not of private waters. * * * The existing rights or vested rights are carefully preserved by the provisions of the statute."[55]

In regard to riparian rights on the Rogue River, a meandering non-navigable stream in the State of Oregon, this Court in a decision respecting the Oregon Water Code made this declaration: "To argue, as plaintiff does, that riparian rights are real property rights which attach to the land, does not put such rights beyond the reach of the police power. * * * The modification of riparian rights which the act of 1909 has effectuated is not so drastic a change as to amount to taking of property without due process of law. * * * At common law, the usufruct of the riparian owner was not absolute; it was conditioned on the equal right of every other riparian

[54] Vol. 8, Oregon Compiled Laws Annotated, Sec. 116–402, as amended L. 1945, Ch. 58, sec. 1.

[55] *Henrici* v. *Paulson*, 134 Ore. 222, 293 Pac. 424, 425 (1930).

owner to the use of the water. By the Oregon legislation, his usufructuary privileges were not destroyed; * * * This legislation, however, has changed the conditions under which the riparian owner's privilege otherwise to use the water may be exercised." [56] In passing, it is observed that the Supreme Court of the United States of America did not consider the last quoted phase of this Court's opinion.[57]

That the principles expressed by this Honorable Court in its last cited opinion comport with the law of the State of Oregon as recently enunciated is clearly evidenced by this statement: "The control by the legislative assembly of all the waters of the state is plenary except that vested rights therein and thereto may not be affected." [58]

Important here is the fact that the Supreme Court of the State of Oregon has specifically held that:

> We remember that, as determined by the decree of adjudication, the title to the defendant's land was acquired prior to the passage of the Desert Land Act of March 3, 1877, to which reference has been made. The title of the defendant theretofore carried with it the common-law riparian rights which have always been recognized in this state * * *.

With continuing reference to Oregon's Act of 1909 here under discussion, the court declared: "The law does not profess to or intend to grant to the board

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[56] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 73 F. 2d 555, 567, 568, 569 (C. A. 9, 1934).

[57] *Ibid.*, 295 U. S. 142, 153, 165 (1934).

[58] *Dill et al.* v. *Killip et al.*, 174 Ore. (94, 147 P. 2d 896, 900 (1944)).

[State administrative agency] of control or to any court the right arbitrarily to take from anyone a riparian right which has its origin prior to the Desert Land Act and give him something else instead thereof. * * *."[59]

Evident from a review of the authorities is this fact: The Legislature when it adopted the Water Code in the year 1909 neither intended nor purported to intend to deprive individual owners of vested rights to the use of water. *A fortiori,* as revealed in the phases of this consideration which follow, the enactment in question did not, it is respectfully submitted, could not, deprive the United States of America or the Warm Springs Indian Reservation of the rights to the use of water appurtenant to their respective lands.

The Supreme Court of the State of Oregon has held that the laws of that jurisdiction cannot affect "the right of the United States to water necessary for beneficial use for Government property"; Oregon's constitution precludes such law

In one of the historical decisions involving rights to the use of water, the Supreme Court of the State of Oregon has enunciated the principle which, it is respectfully submitted, governs under the circumstances which here prevail.[60] This authoritative statement is there made: "The case of *United States* v. *Rio Grande Irrigation Company,* 174 U. S. 690, 702

[59] *Norwood* v. *Eastern Oregon Land Company*, 112 Ore. 106, 116, 117; 227 Pac. 1111, 1114 (1924). Note: This case cited 73 F. 2d 555, 560.

[60] *In re Hood River*, 114 Ore. 112, 172; 227 Pac. 1065, 1084 (1924).

* * * is authority for the statement that it is undoubtedly true that a state may change its common-law rule as to every stream within its dominion and permit the appropriation of the flowing water for such purposes as it deems wise." Continuing, Oregon's court declared:

> **This authority [of the State] is limited in the absence of the consent of Congress, so that the state cannot destroy the right of the United States to water necessary for beneficial use for government property * * ***

In precisely the same vein is this statement by Oregon's highest court: "* * * a state may change its common-law rule as to every stream within its dominion, * * *. Nevertheless, declared the court, absent Congressional consent, that

> authority is limited, * * * [1] so that the state cannot destroy the right of the United States to water necessary for beneficial use for government property * * *.[61]

By those last-quoted excerpts from decisions of Oregon's Supreme Court is reflected the genesis of the law respecting Federal-State relationship over the appropriation of rights to the use of water. Revealed by those quoted statements are the fundamental precepts of the law laid down by the Supreme Court of the jurisdiction in question in perhaps the most important state decision in the field of Western Water law.[62] They take cognizance of the limitation upon

[61] *Ibid.*, 227 Pac. 1084.

[62] *Hough* v. *Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

the police power of the State in regulating the acquisition and administration of rights to the use of water which preclude the destruction of such rights owned by the United States of America and essential to the use of its property—a restriction, let it be emphasized, which is identical with those which necessarily exist with reference to any of the activities of the United States of America when functioning within its sphere of delegated authority. That limitation, let it likewise be emphasized, is inherent in the organic laws pursuant to which the State of Oregon was admitted into the Union. The admission act [63] pursuant to which Oregon joined the family of States comprising the Union, contained this condition: "Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States * * *."

With reference to the term "soil" as there used is this statement by the Supreme Court of the State of Oregon respecting the power and authority of the United States to administer the public domain:

> This unquestioned power of the owner [the United States of America] over the public domain was exercised, and any one entering upon, and acquiring title to, any part of the public domain after the passage of this act accepted such land and title thereto with full

[63] 11 Stat. Chap. 33, Sec. 4, p. 383, 384.

> knowledge of the law under which the patent was issued; the import thereof being that *this right incident to the soil* was reserved by the government * * *. [Emphasis supplied.]

Thus the term "soil" with reference to the land of the United States of America within the State of Oregon has been used synonymously with the term "real property and appurtenant rights to the use of water." Consonant with that conclusion is this statement:

> * * * in the enabling Acts * * * it is provided * * * that the State will never interfere with the primary disposal of the public lands within its limits. In these provisions the waters flowing within the boundaries of the State must be included as a part and parcel of the public lands.[64]

In connection with the preceding statement it is essential to allude to that phase of the memorandum in which there was reviewed the congressional act establishing the Territory of Oregon. There Congress expressly provided that the rights of the Indians would not be impaired and Congress reserved exclusively to itself the full power to regulate and administer the lands and properties of the Indians. Thus Oregon is without power to adopt legislation which would interfere with the Indians, their land or their rights to the use of water. It is equally manifest that the provision in the Territorial Act prohibiting obstructions in the streams and rivers in which salmon are found was not a limitation upon congressional

[64] *Hough* v. *Porter*, 51 Ore. 318, 391; 95 Pac. 732; 98 Pac. 1083, 1092 (1908, 1909). See Kinney on Irrigation and Water Rights, 2d ed., vol. 2, sec. 638, page 1118.

authority and could not prevent subsequent enactments authorizing the construction upon lands of the United States dams of the character here involved.

Worthy of reference in that regard are provisions of the enabling acts of Western States admitted to the Union subsequent to the admittance of the State of Oregon. With specificity the Congress has conditioned the entrance into the Union of those States on agreement that they would refrain from interference with the properties of the United States of America and the Indian Tribes. For example, the States of Idaho, Washington, and Montana at the time they assumed statehood, agreed and declared that they would "forever disclaim all right and title to the unappropriated public lands" within their boundaries and to all lands "owned or held by any Indians or Indian tribes * * * and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, * * *."[65]

Evident from those provisions of the organic laws of the States last mentioned, they have banned themselves from enacting laws affecting the property of the United States of America and the Indian Tribes. Authority is not required to support the proposition that the States of Washington, Idaho, Montana, and Oregon were admitted into the Union on an equal

[65] Washington Constitution, Article XXVI, Second; Montana Constitution, Ordinance No. 1, Second; see Constitution of Idaho, Article 21, Sec. 19.

footing. Thus the limitations explicit in their admission to the Union is implicit in regard to the admission act of the State of Oregon. Accordingly, it is respectfully concluded, as the Supreme Court of the State of Oregon has recognized: The State is without power or authority to affect in any way the lands and appurtenances of the United States of America or the Indian Tribes. Necessarily that conclusion includes rights to the use of water.[66] For as stated by this Honorable Court and revealed above:

> Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the ACT of July 26, 1866, 43 U. S. C. A. § 661, requires recognition of those rights. That statute, however, applies only to "public" lands. * * * Lands which are reserved are severed from the public domain. * * * The statute mentioned, therefore, does not, we think, apply here. **Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the [Indian] reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, "shall remain under the absolute jurisdiction and control of the Congress of the United States."** [67]

To this point the comments contained in the brief of authorities have been devoted to the basic principle that the United States of America is not subject to the police regulations of the State. Emphasized, how-

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[66] *United States* v. *McIntire*, 101 F. 2d 650, 654 (C. A. 9, 1939).

[67] See 25 Stat. 676, Sec. 4 (pertaining to both Washington and Montana).

ever, has been the equally basic principle that the State of Oregon in adopting its Water Code in 1909 did not assume title to waters of the State in the proprietary sense of the term. Rather, in accordance with the well established tenets of the law that Code was enacted for regulatory purposes and did not—could not, divest the United States of America of its rights to the use of water. In the paragraphs which succeed there will be reviewed the Congressional enactments pursuant to which the United States of America made available for appropriation rights to the use of water upon the public domain. Let it, however, be emphasized again that the lands here involved are not subject to the Acts of 1866, 1870, and 1877.

Congress by the Desert Land Act[68] and antecedent acts[69] did not grant to the States the title to the rights to the use of water on the public domain

In detail the character of the police regulations of the State of Oregon relating to the appropriation and administration of rights to the use of water was reviewed in the phase of this brief which immediately precedes. Disclosed by the authorities cited there is the principle that when the State of Oregon declared that, "All waters within the state * * * belong to the public" it was speaking as a sovereign for purposes of regulation, not as a proprietor. Thus, assuming a State could divest the National Government of property, which is denied, it is evident that Oregon by the

[68] 43 U. S. C. 321.
[69] 43 U. S. C. 661.

enactment in question had no such intent. As a consequence there is to be considered in this portion of the brief the question of whether the United States of America divested itself of title to the rights to the use of water which gave rise to the subject opinion. There are two phases of that query [1] the statutes in question as they have been construed; [2] their inapplicability to the lands here involved. Each of those facets of the problem will be considered in the order in which they have been set forth.

A. The Desert Land Act and related acts severed the rights to the use of water from land and reserved it for appropriation [70]

Essential to this element of the consideration is a review of the Act of 1866,[71] the Act of 1870,[72] and the Act of 1877, the Desert Land Act.[73] Especially pertinent is the language used in those acts as it reveals the basis upon which the Supreme Court of the State of Oregon rendered its historical opinion.

By the Act of 1866 the Congress declared that "Whenever, by priority of possession, rights to the use of water * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same * * *." Thereafter in the Act of 1870 Congress provided that "All patents

[70] *Hough* v. *Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

[71] 43 U. S. C. 661 (Act of July 26, 1866, C. 262, Sec. 9, 14 Stat. 253.)

[72] 43 U. S. C. 661 (Act of July 9, 1870, C. 235, Sec. 17, 16 Stat. 218.)

[73] Act of March 3, 1877, C. 107, Sec. 1, 19 Stat. 377.

granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, * * * as may have been acquired under or recognized by this section." Thus said our Supreme Court with reference to the acts last cited, the "right by prior appropriation was recognized by the legislation of Congress in 1866." [74]

Following the two enactments which accorded Congressional cognizance to the doctrine of prior appropriation so essential to our Western development was the Desert Land Act of 1877. That act having authorized entry upon desert lands of the United States of America, requiring a declaration under oath that the entryman "intends to reclaim a tract of desert land" provided "That the right to the use of water * * * shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, * * *; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

That quoted language, declares the Supreme Court of the United States "* * * effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." [75] Following the

[74] *Atchison* v. *Peterson*, 87 U. S. 507, 510, 513 (1874).

[75] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 158 (1934).

enactment of the Desert Land Act, continued the Court:

> * * * all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.[76] Especially pertinent in regard to the last cited decision of the Supreme Court of the United States is that it adopted and paraphrased the opinion of the Supreme Court of the State of Oregon on the subject.[77] Relative to that Oregon opinion the Supreme Court declared: "The supplemental opinion which deals with the subject beginning at page 382 is well reasoned, and we think reaches the right conclusion." [78]

That "right conclusion" as expressed by the Supreme Court is embraced in this quoted sentence: "The national government by its various laws relating to public lands granted to its citizens the privilege of acquiring title thereto. Construing all together as one act, the desert land act by the language used appears to reserve therefrom to the entire public the right of any citizen after March 3, 1877, to divert, use, and acquire a right in and to the unappropriated waters flowing through, or adjacent to, any lands thereafter patented, such right to be determined by priority. * * *" [79] Continuing, the Oregon Court declared:

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[76] *Ibid.*, 295 U. S. 142, 162.

[77] *Hough* v. *Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

[78] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 160, 161.

[79] *Hough* v. *Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083, 1091 (1908; 1909).

> "* * * This unquestioned power of the owner over the public domain was exercised * * *; the import thereof being that this right [to the use of water] incident to the soil was reserved by the government, to be held in trust for the public, and that he who first applies the water to a beneficial use shall become the owner of the right thereto, * * *."[80] Consonant with that declaration the Highest Court stated: "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.[81]

Thus both the Supreme Court of the United States of America and Oregon's highest court have declared [1] That unappropriated rights to the use of water on the *public domain* were severed from the land—were made available for appropriation separate and apart from the land; [2] That the waters thus severed were reserved for "the appropriation and use of the public" subject to existing rights.

Especially pertinent in regard to the reservation of rights to the use of water on the public domain

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[80] *Hough* v. *Porter*, 51 Ore. 318, 391; 95 Pac. 732; 98 Pac. 1083, 1092.

[81] *California-Oregon Power Co.*, v. *Beaver Portland Cement Co.*, 295 U. S. 142, 162 (1934).

for appropriation by the public is this statement by the Supreme Court of Oregon:

> * * * the government can deal with its lands as other land proprietors can deal with theirs. In the Pacific Coast states, congress has recognized the privilege of private citizens to acquire usufructuary interest in the waters of public streams, independent of riparian ownership. This is but one way, however, of disposing of the public domain.[82]

Otherwise stated, the title to the rights to the use of water thus severed was reserved by and resided in the United States of America until a citizen exercised the privilege of appropriating those rights in conformity with the conditions for acquiring them as prescribed by the State. The State of Oregon, like the State of California, recognizes that the source of the title to rights to the use of water which are appropriated on the public domain is the United States of America. Respecting that statement reference is made to the decision of the State of California which fixed for all time the theory of the water law of that State:

> * * * and from a very early day the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct

[82] *Nevada Ditch Co.* v. *Bennett*, 30 Ore. 59, 104, 45 Pac. 472, 484 (1896).

> from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California as the owner of innavigable streams and their beds; and, since the act of congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, *such rights have always been claimed to be deraigned by private persons under the act of congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.*[83] [Emphasis supplied.]

From the same source as the statement last quoted is taken this pertinent excerpt: "The government of the United States has the absolute and perfect title to its lands." Also this statement: "* * * the grantee or patentee acquires from the United States—the absolute and unqualified owner of the public lands—common-law rights in the waters flowing through the land granted (except where the waters, or a portion of them, are reserved) has never been disputed."[84]

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[83] *Lux* v. *Haggin*, 69 Cal. 255, 338; 10 Pac. 674, 721 (1886).

[84] *Lux* v. *Haggin*, 69 Cal. 255, 338; 10 Pac. 674, 722 (1886).

In a comprehensive review of the authorities there is clearly reflected the principle enunciated above to the effect that the United States of America severed the waters from the public domain and accorded to the public the privilege of appropriation of those waters.

There is complete consistency in the principles of law which have been reviewed. Each of the sovereigns, the United States of America and the State of Oregon, has within the sphere of its respective authority, taken steps to insure the highest and best use of the limited supply of water available on the public lands of the arid West—the National Government has reserved those waters for appropriation; the State through its police regulations has provided the modus operandi, in the words of the Supreme Court of the State of Idaho, pursuant to which the State has acted to guarantee "that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity."[85] Each sovereign within its sphere of authority has acted; neither sovereign is, however, subject to the control of the other.

In the words of the Supreme Court of the United States:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * Congress intended to establish the rule [by the Acts of 1866, 1870,

[85] *Walbridge* v. *Robinson*, 22 Idaho 236, 125 Pac. 812, 814 (1912).

> 1877] that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.[86]

Continuing, the Supreme Court stated: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, * * *."[87] Undeniably the State in its police power had full control over rights to the use of water on the *public domain* as between the *individual* claimants before it. That plenary power of the State exercised in the form of the comprehensive police regulations for the administration of rights to the use of water did not—it is respectfully submitted, could not—nor does it purport to, include the United States of America. Equally clear, as revealed above, is the fact that Oregon could not affect the interests of the United States in the waters severed from the public domain and reserved for appropriation. In the words of the Supreme Court: "State laws cannot affect titles vested in the United States."[88]

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[86] *California-Oregon Power Co.*, v. *Beaver Portland Cement Co.*, 295 U. S. 142, 162 (1934).

[87] *California-Oregon Power Co.*, v. *Beaver Portland Cement Co.*, 295 U. S. 142, 163, 164 (1934).

[88] *United States.* v. *Utah*, 283 U. S. 64, 75 (1930) See review of authorities declaring that State police regulations cannot control the United States of America.

B. The United States of America by withdrawal of property from the public domain excepts the rights to the use of water which are involved from the police regulations of the State

The principles governing this phase of the consideration have been enunciated by the Supreme Court of the State of Oregon.[89] There that court commented at length regarding the power of the United States of America over rights to the use of water on the public domain. "Now, if such an estate [an appropriative right] may be carved out of the public domain for an individual, it may be reserved by the general government; * * * which may lay hold of and use them, without taking any of the steps made necessary to obtain a usufructuary interest therein by private individuals."[90] By that succinct statement Oregon's highest court in substance declared that the United States of America was empowered to utilize the waters of the public domain without regard to the police regulations which govern the appropriation of rights to the use of water by individuals. That decision is entirely consonant with the proposition that by the Desert Land Act of 1877 and the related antecedent acts there was constituted a reservation in the United Staes of America of the waters on the public domain.

In accord with the principles recognized by the Supreme Court of the State of Oregon, Montana's highest court has declared:

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[89] *Nevada Ditch Company* v. *Bennett*, 30 Ore. 59, 104; 45 Pac. 472, 484 (1896).

[90] *Nevada Ditch Company* v. *Bennett*, 30 Ore. 59, 104; 45 Pac. 472, 484 (1896).

> A water right can therefore be acquired only by the grant, express or implied, of the owner of the land and water. The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States Government as owner of the land and water. Such grant has been made by Congress.[91]

Following the principle set forth in the last-quoted excerpt the Supreme Court of the State of Montana reaffirmed its earlier pronouncement.[92] So relevant are the facts that they will be reviewed: There the United States of America utilized water from Bear Creek on the Ft. Ellis Military Reservation. From that source ditches were constructed to divert 200 miner's inches of water. By a specific act of Congress adopted in 1891, the lands comprising the then abandoned Ft. Ellis Reservation were made available to the State of Montana, which was permitted to select that property upon which the waters there involved had been used. In the words of the Court: "It is contended by the Attorney General [of Montana] that Congress granted to the state the ditch from Bear Creek, together with the right to use 200 inches of the waters of said creek." Denying Montana's contention on the grounds that the grant of the land did not carry with it the rights to the use of water, the Court made this pertinent statement:

> Prior to the time of settlement upon the lands in question, and prior to the appropriation of

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[91] *Smith* v. *Denniff*, 24 Mont. 20, 21; 60 Pac. 398 (1900).

[92] *Story, et al.*, v. *Woolverton, et al.*, 31 Mont. 346, 353, 354; 78 Pac. 589, 590 (1904).

> the waters of Bear creek by any one, both the land and the water were the property of the government. When the government established the reservation, it owned both the land included therein, and all the water running in the various near-by streams to which it had not yielded title. It was therefore unnecessary for the government to "appropriate" the water. It owned it already. All it had to do was to take it and use it. When the government abandoned the military reservation, it also must have abandoned the use of the water thereon, which was again allowed to flow in its regular channel as a part of the public domain, subject to the appropriation of any one who sought to take it.

Reference in regard to that quoted excerpt is made to the Constitution of the State of Montana, asserting that the use of water within the jurisdiction in question is a public use.[93]

Decisions of the Supreme Courts of the States within the Ninth Circuit have reiterated and reaffirmed the doctrine that the United States of America by the Acts of 1866, 1870 and 1877 did not relinquish title to the unappropriated waters on the public domain. It is the principle adhered to by the State of California.[94]

A frequently cited case rendered by the Supreme Court of the State of Idaho adopted the concept that the United States of America is the source of the title

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[93] Constitution of Montana, Article III, Sec. 15.

[94] *Lux* v. *Haggin*, 69 Cal. 255, 10 Pac. 674 (1886); *Wood* v. *Etiwanda Water Co.*, 122 Cal. 152; 54 Pac. 726 (1898); *The San Joaquin & Kings River Canal & Irrigation Co.* v. *Worswick*, 187 Cal. 674, 203 Pac. 999 (1922).

to rights to the use of water.[95] Very early in the history of western water law the Supreme Court of the State of Washington declared, it is respectfully submitted, the principle which here governs: "It was apparent to congress, and, indeed, to every one, that neither local customs nor state laws or decisions of state courts could vest the title to public land or water in private individuals without the sanction of the owner, viz, the United States. The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; * * *."[96]

Emphasizing its earlier—and above-quoted—declaration on the proposition, Washington's highest court decided: "* * * up to that time [of patent] the title to the land, with all its incidents, is vested in the United States, utterly beyond the power or control of state Legislatures, and the party thereafter acquiring title from the government acquires the land with all its incidents."[97]

This authoritative summary is reflective of the decisions which have to this point been reviewed:

> The Government is still the owner of the surplus of the waters flowing upon the public domain, or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. * * * It therefore follows, as the result of the ownership by the United States

[95] *Le Quime et al.* v. *Chambers*, 15 Idaho 405; 98 Pac. 415 (1908).
[96] *Benton* v. *Johncox*, 17 Wash. 277, 289; 49 Pac. 495, 499 (1897).
[97] *Kendall* v. *Joyce*, 48 Wash. 489; 93 Pac. 1091, 1093 (1908).

> of the waters flowing upon the public domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the face of any claim which may be made by the Government, *at least* to all the surplus or unused waters within such State.[98]

This Honorable Court has uniformly recognized the principle that the United States of America has the power to reserve the public lands and the water on those lands for the Nation's welfare.[99] "The policy of reclaiming the arid region of the West for a beneficial use open to all the people of the United States is as much a national policy as the preservation of rivers and harbors for the benefit of navigation. * * *

"That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose, was held by this court in *Winters* v. *United States,* * * *.

"To the same effect was the decision of this court in *Conrad Inv. Co.* v. *United States,* * * *."

From the *Winters* opinion of this Honorable Court, cited in the quoted excerpt, this statement is taken:

> And it is * * * well settled that, when the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and that no subsequent law or sale should be construed to embrace or operated upon them. * * *

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[98] Kinney on Irrigation and Water Rights, Vol. 1, 2d ed., Sec. 411, pp. 692, 693.

[99] *Burley* v. *United States*, 179 Fed. 1, 11, 12 (C. A. 9, 1910).

> In conclusion, we are of opinion that the court below did not err in holding that, "when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk river, at least to an extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees." [100]

Continuing to recognize the power of the United States of America to sever from the public domain and utilize unappropriated waters bounding or traversing those lands, this Court declared: "* * * the policy of the government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case." [101]

At this point it is essential to allude to a decision of this Court which it cites in the subject opinion.[102] There this Court declared that the United States of America may "not interfere with state legislation over waters of the state." That statement is, of course, fundamental. Manifestly, the United States of America is not empowered to foist upon the State the kind and character of rights which may be recognized within a particular jurisdiction; whether riparian rights will be protected or abrogated; when a commission or a State officer will administer. Yet,

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[100] *Winters* v. *United States*, 143 Fed. 740, 748, 749 (C. A. 9, 1906); affirmed 207 U. S. 564 (1908).

[101] *Conrad Inv. Co.* v. *United States*, 161 Fed. 829, 832 (1908).

[102] *United States* v. *Hanson*, 167 Fed. 881, 884 (C. A. 9, 1909).

it is respectfully submitted, the principle there propounded does not prevent the United States of America from exercising unappropriated rights to the use of water to fulfill its own needs. Such an exercise must necessarily take cognizance of vested rights, and is limited to the use of water which the Central Government may need.

In thus declaring the sphere in which the State police regulations are operative, this Honorable Court was stating in different terms the principle recognized by the Supreme Court when it ruled, as between individual claimants, that "all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, * * *."[103] That "plenary control" does not and, as emphasized above, could not embrace the National Government. For, as the Supreme Court of the State of Oregon has repeatedly held: "the state cannot destroy the right of the United States to water necessary for beneficial use for government property * * *."[104] Neither may the States preclude the utilization of the unappropriated rights to the use of water on the public domain. That conclusion, as revealed above, was reiterated and reemphasized by this Honorable Court when it recently declared: "It is of course well settled that private rights in the waters of non-

[103] *California-Oregon Power Co.*, v. *Beaver Portland Cement Co.*, 295 U. S. 142, 163, 164 (1934).

[104] In re Hood River, 114, Ore. 112, 172, 227 Pac. 1065, 1084 (1924); *Hough* v. *Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

navigable streams on the public domain are measured by local customs, laws and judicial decisions. * * *

> But it does not follow that the Government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes.[105]

There is no conflict between the principles thus propounded that the United States may withdraw the waters made available for appropriation prior to the actual exercise of the right by an appropriator, and the theory that the Acts of 1866, 1870 and 1877 constituted a dedication of the waters on the public domain to the public. It is a basic proposition of law that: "Prior to acceptance, dedication is an offer continuing until revoked. The offer may be withdrawn or revoked at any time before acceptance, either actual or implied."[106] That tenet of the law has been stated in these terms: "In general, the proprietor may revoke or withdraw his offer of dedication, in whole or in part, at any time before it is accepted by the public or its representative and before the rights of private persons have intervened."[107] Thus, in complete accord with the accepted principles of real property law, to the extent that the waters on the public domain have not been appropriated, they may be withdrawn from appropriation. That statement comports fully with the numerous decisions

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[105] *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334, 336, 337 (C. A. 9, 1939).

[106] Thompson on Real Property, Vol. 2, Sec. 488, p. 58.

[107] 16 Am. Jur., Dedication, Sec. 29, p. 375.

of this Honorable Court. It is sustained by the declaration of the Highest Court that:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.[108]

Congress has reserved rights to the use of water. Respecting the National Forests severed from the public domain this authoritative statement has been made: "The last clause of the Act of Congress quoted above, 'or under the laws of the United States and the rules and regulations established thereunder,' reserves in the United States rights to the use of waters flowing over forest reserves or National Forests." [109] Similarly, Congress has provided for the withdrawal of "Lands containing water holes or other bodies of water needed or used for watering purposes * * *." [110] President Calvin Coolidge, exercising the powers thus conferred "ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole * * * be, and the same is hereby, withdrawn * * * and reserved for public use * * *." [111]

These are but examples of the powers exercised by Congress over the water on the public domain subsequent to the passage of the Desert Land Act and acts antecedent to it. That exercise of power is in full

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[108] *Winters* v. *United States*, 207 U. S. 564, 577 (1908).

[109] Kinney on Irrigation and Water Rights, 2d ed., vol. 2, sec. 669, 16 U. S. C. 481.

[110] 43 U. S. C. 300.

[111] Executive order dated April 17, 1926.

conformity with the repeated declarations by this Honorable Court and the Supreme Court, that "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."

This case does not involve any conflict over rights to the use of water—there is involved only a nonconsumptive use of water upon lands title to which has never passed from the United States of America or from the Indians and which are subject to the complete control of Congress

The case concerning which the subject opinion was written did not involve a conflict over rights to the use of water. Sole question there presented is whether the police regulations of the State of Oregon controlled the United States of America in regard to its own lands which were not part of the public domain.

Judge Healy's dissent points out this salient feature of the matter: "* * * as the Federal Power Commission's order respecting the installation of a re-regulating dam [located off of reservations of the United States] apparently conforms in every way to the State's requirements, there would appear to be no case or controversy here with respect to this portion of its order. * * *

> Hence the controversy concerns only the matters already discussed, namely the right of the United States to license the construction of the high dam and the power plant [situated entirely upon lands of the United States of America and the Indians withdrawn many years ago as power sites]." [112]

[112] Opinion, page 15.

It is to be observed, moreover, that the issues in other cases involving navigable streams situated east of the One Hundredth Meridian have no application in the subject proceeding.[113] Clearly the Acts of 1866, 1870, and 1877 have no application to the properties involved in the case last cited. Here it is asserted that the United States of America reserved the rights to the use of water which the licensee seeks to exercise and that the police regulations of the State of Oregon have no application. In addition it is to be emphasized that for reasons expressed above, the State of Oregon could not by its own legislation in any manner affect the title and interests of the United States to the rights to the use of water thus reserved. For as most recently declared by the Highest Court: "The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.' "[114] As Congress has authorized the Federal Power Commission to proceed in the manner discussed in the subject opinion, as the lands in question are not part of the public domain, it is respectfully submitted that the issuance of the license in question was fully within the authorization of the Federal Power Commission.

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[113] *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, C. A. D. C., 1952, 202 F. 2d 190, 207; affirmed March 15, 1954, Supreme Court of the United States, No. 28 October Term 1953.

[114] *Opinion State of Alabama, Complainant* v. *State of Texas; State of Rhode Island et al.* v. *State of Louisiana*, Per curiam, October Term, 1953, dated March 15, 1954.

CONCLUSION

In conclusion your Petitioners respectfully pray that in the light of the circumstances and the great and fundamental issues involved the United States of America be allowed a rehearing before the full bench.

Respectfully,

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CERTIFICATE OF COUNSEL

I certify that the foregoing petition for rehearing en banc is, in my judgment, well founded and that it is not filed for the purposes of delay.

J. LEE RANKIN,
Assistant Attorney General.

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